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3. Execution (§ 60*)—Clerk at Common Law Had No Right to Issue without Direction.—At common law clerk of court has no right to issue any execution without the direction of the plaintiff or his attorney.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 448.]

Error to Circuit Court, Augusta County.

Action by J. W. Fitzgerald against James Campbell. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Hugh A. White, of Staunton, and *Chas. A. Hammer*, of Harrisonburg, for plaintiff in error.

Curry & Curry and *Timberlake & Nelson*, all of Staunton, for defendant in error.

SMITH v. STATE HIGHWAY COMMISSION OF VIRGINIA et al.

Nov. 21, 1921.

[109 Va. 312.]

1. Master and Servant (§ 364*)—State Highway Commission Is Not "Employer" within Compensation Act.—The State Highway Commission of Virginia is not the employer of those working under it within Workmen's Compensation Act, §§ 2a, 8, providing that employers shall include the state, any municipal corporation within the state, or any political division thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employment. For other cases, see 17 Va.-W. Va. Enc. Dig. 698.]

2. Master and Servant (§ 364*)—State Liable for Compensation as Employer of Highway Commission's Employee.—Within Workmen's Compensation Act, § 2a, defining employers, the state is the employer of those working for the State Highway Commission.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 688.]

3. States (§ 130*)—Appropriation Necessary for Payment of Workmen's Compensation by State.—Since the Legislature, though it has provided by the Workmen's Compensation Act for compensation for injuries to state employees, has made no provision for the payment of claims for such injuries, and Code 1919, § 2582, provides that no judgment or decree, unless otherwise provided, shall be paid without special appropriation, the Industrial Commission cannot direct the payment of compensation for the death of the state employee working

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

under the Highway Commission from any fund, but the payment must be provided for by special appropriation by the Legislature.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 735.]

Certified from Industrial Commission.

Claim by Grace Lillard Smith before the Industrial Commission against the State Highway Commission of Virginia and the Commonwealth of Virginia to recover compensation for the death of claimant's husband employed by the Highway Commission. On questions of law certified by the Industrial Commission. Claimant held entitled to compensation from the Commonwealth, but not from the State Highway Commission.

BEAR'S ADM'X *v.* BEAR.

Nov. 17, 1921.

[109 Va. 313.]

1. Appeal and Error (§ 1170 (3)*)—Permitting at Trial Inclusion of Defense Previously Asserted Held Not Prejudicial.—Where defendant stated the grounds of his defense under plea of nil debet as infancy, and that the note was without consideration and not intended to be collected, but the latter grounds were apparently overlooked, plaintiff, under Code 1919, § 6104, was not prejudiced by the court's action in permitting defendant at the trial to amend his statement of defense by adding those grounds thereto.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 584.]

2. Evidence (§ 437*)—Infant Can Show There Was No Intention that Note Was to Be Paid.—The rule excluding parol evidence to contradict a written instrument does not prevent an infant from testifying that a note given by him, claimed by plaintiff to have been for necessities, was not intended to be paid, since the infant is liable only for the reasonable value of necessities furnished, not on the contract therefor.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 689.]

3. Pleading (§ 339*)—Conduct of Judge Held Not Refusal of Leave to Withdraw Plea of Infancy.—Where defendant stated on cross-examination that he did not rely on his plea of infancy, it was not error for the trial court, after informing him he could withdraw such plea if he chose, to permit him to leave the stand and confer with his counsel, and, on the counsel's announcement in the defendant's presence that the plea should stand, to refuse to consider it withdrawn.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 231.]

4. Trial (§ 194 (12)*)—Instruction that Sending Infant to Academy Was Not Necessary Invades Province of Jury.—In an action on

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